IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.657 OF 1990

Vilas Laxman Deshmukh ,)
Resident of Vile, Taluka Mangaon,)
District Raigad.) ...Appellant

Versus

1. The State of Maharashtra)

2. Jairam Anna Koli,)
Resident of Vile, Taluka Mangaon,)
District Raigad.) ...Respondents

Shri Subodh Desai for the Appellant.
Shri D.P. Adsule, A.P.P for the Respondent No.1.

CORAM : ABHAY S. OKA, J.

DATE : NOVEMBER 09, 2006.

ORAL JUDGMENT:

1. Heard the learned Advocate for the Appellant and the learned A.P.P for the State. The challenge in this Appeal against an order of conviction is to the Judgment and order dated 27th September, 1990 passed by the learned Additional Sessions Judge, Raigad at Alibag. the Appellant has been convicted for the offence under section 304 (IInd Part) of the Indian Penal Code.

2. Briefly stated, the case of the prosecution is that the deceased Babu Jairam Koli was paid advance wages of Rs.10/- on 14th or 15th February, 1988 by the Appellant-accused. The advance payment was made to the deceased Babu for attending to the work on next day. However, the said Babu failed to attend the duty. The said Babu was found chit-chating with P.W.4 Kisan Waghmare near a borewell in front of the house of the Appellant. At that time the deceased Babu was taken to the said house of the Appellant. The said house of the Appellant was adjacent to house of one Babu Sundar Deshmukh. The Appellant-accused gave a severe beating to the deceased with fist blows all over the body including the head. The case of the prosecution is that P.W.4 Kisan had seen the said incident by peeping into the room in the house of the Appellant. After a while, the deceased came out of the house of the Appellant. At that time P.W.4 Kisan observed that the deceased came out with unsteady gait. Infact, the deceased vomited blood near the house of one Rashid. At about 4.30 p.m the deceased met his father (P.W.3 Jairam) and informed him about

the assault at the hands of the Appellant resulting into vomiting of blood. Though his father advised him to seek medical treatment, the deceased ignored the advise as he was afraid of injection. According to the prosecution case after lapse of 7 to 8 days, on 22nd Febraury, 1978 there was sub-dural haemorrhage on account of blunt trauma which led to deceased becoming unconscious. According to the prosecution case, the cause was the beating received by the deceased from the Appellant-accused. According to the prosecution case the deceased was attended by a local medical practitioner Dr. Modi who recommended that the deceased should be taken to Primary Health Centre. According to the prosecution case, on the way to the Primary Health Centre deceased breathed his last.

3. The prosecution examined six witnesses. The prosecution alos relied upon documentary evidence. P.W.1 is one Shri Mahmood Bandarkar who was working as a Circle Inspector of Nizampur Circle in Taluka Mangaon, District Raigad. After visiting the spot of incident, he prepared a sketch map on the basis of a copy of the

panchnama provided by the police. The said sketch map (Exhibit 14) was proved in evidence by the said witness. P.W.2 Dr. Dayanand Kode was at the relevant time medical officer in-charge of the Primary Health Centre at Shiravli, Taluka Mangaon, District Raigad. He performed post mortem on the body of the deceased. He deposed that the cause of death was intracarnial haemorrhage due to blunt trauma to the head. He stated that even due to fist blows such injuries are possible thereby causing intracranial haemorrhage. He stated that bright red colour effusion of blood was collected downwards into the base of the skull and the subdural haemorrhage diffused over both cerebral hemispheres. He stated that it was a frank blood without clotting. He stated that there were small petectial haemorrhages in the brain. In the cross-examination, he stated age of the injuries described in column 17 (i.e. surface wounds and injuries) was within 48 hours. He stated that the said injuries were not as old as 7 to 8 days. He admitted that he did not notice any skull fracture. He stated that injuries described in column No.19 must have been sustained within 24 hours because it had a

frank
blood. Injuries described in column No.19 were not possible 7 to 8 days prior to the post mortem. He denied the suggestion that brain injury is possible due to extreme intoxication as a result of liquor consumption. He admitted that for want of viscera report he cannot opine about the final cause of death in the case.

4. P.W.3 Shri Jayram Anna Koli is the father of the deceased. He stated that deceased Babu was provided a government hut at a distance about 100 feet from his hut. He stated that about 2 and 1/2 years back Babu came to his hut at about 10 a.m. At that time he found that blood was oozing from his mouth. On inquiry made by the said witness, the deceased disclosed that the accused had given him fist blows all over the body in his house. He stated that cause of beating was that deceased Babu had not attended private work of the accused though he had received advance wages. P.W.3 advised him to get medical treatment. However, the deceased refused to attend the hospital by stating that he was afraid of

injection. He stated that thereafter deceased proceeded towards his own house and 7 to 8 days thereafter he expired in his hut. The F.I.R was filed by P.W.3 on 22nd February, 1988 which was proved in evidence. In the cross-examination he admitted that one Babi Koli is younger sister of his wife. He admitted that the said Babi Koli and other persons were prosecuted for assaulting police at the time of raid conducted by the police. He stated that the said group of Babi Koli dealt with the business of manufacturing illicit liquor in the village. He stated that he was not aware whether the Appellant was panch witness in the raiding party of the police.

5. He admitted that he did not disclose in the F.I.R that 7 to 8 days prior to the death when deceased had came to him, he had informed him about the beating with fist blows by the accused. He admitted that for period of 7 to 8 days after the alleged assault, the deceased was moving in the village. He stated that there is a music band group comprising of himself, deceased and one Pandu. He stated that their group used to perform in local

marriages. He stated that they attended marriage of son of one Sitaram on 13th February, 1988 for playing their band. He stated that the deceased attended the said marriage. He, however, stated that the deceased was simply sitting and did not operate his drum. He admitted that deceased used to consume alcohol occasionally. He admitted that deceased vomited blood just before his death. Though he admitted that Dr Modi was running a dispensary in the village, he pleaded ignorance whether deceased was taken to the dispensary of the Dr. Modi. He further admitted that the deceased vomited blood in front of the dispensary of Dr. Modi before he was examined by Dr. Modi.

6. P.W.4 Shri Kisan Waghmare is the resident of the said village. He stated that he was serving in the agricultural land of one Bapu Deshmukh, a resident of the same village. He stated that at about 10.00 a.m when he was at Katkarwadi while returning from his employer’s land he met the deceased near a public well. At that time the Appellant-accused called deceased to his house. According to him he advised deceased Babu to go with the accused and after

completing his work to return back. According to the said witness, the deceased Babu entered the house of the accused alongwith the accused. He stated that he observed while standing near bore-well that the accused closed the door and bolted it from inside. He stated that he was at a distance of 50 feet from the door of the said house. He stated that the deceased was making hue and cry due to assault at the hands of Appellant-accused. He stated that he went to the padvi of adjoining house which belong to one Bapu. He stated that the permission of the said Bapu he sat in the padvi. He stated that there is a window in the house of the accused which was opening towards the said padvi. He stated that he peeped through the window and saw beating given by the accused with fists to the deceased. He stated that the blows were given on the head, back and abdomen. He stated that he left the house of Bapu and started leaving towards temple. He attended to his duty in his employer’s land. The witness at the same time stated that he went to the house of his employer from the Maruti temple. He stated that when he was sitting near the door of the house, he found that the deceased Babu was walking

unsteadily from the house of the accused and was proceeding towards bazar area. He stated that he vomited outside the shop of one Rashid. He thereafter stated that the deceased vomited blood on two or three occasions. He stated that he followed deceased to the house of Rashid where water was served to the deceased.

7. In the cross-examination he admitted that he did not tell the police about the hue and cry raised by the deceased which was heard by him while he was standing near the bore-well. He stated that he was sitting in the padvi of Bapu Deshmukh for about five minutes. He admitted that nothing is visible from the padvi of Bapu inside the house of the Appellant-accused. He stated that after sitting there for five minutes, he went towards temple and was there for 10 minutes. He, therefore, attended to his duty with employer for about 10 minutes. He stated that he did not disclose the assault made by the Appellant-accused on the person of the deceased either to the wife of his employer or to his employer. He admitted that the window in the house of the

Appellant-accused was provided with an iron grill and wooden plank. He stated that window is having height of 4 feet from the ground floor. He stated that he was peeping through the window by raising his heels. He stated that he did not see any person other than deceased and the accused. He admitted that in the police statement he stated that the Appellant's wife and daughter were present in house of the Appellant when he was peeping through window. He stated that he did not tell any one about the assault by the accused during the period of 7 to 8 days when the deceased was alive. He admitted that two to three days after the death of the deceased, police contacted him alongwith the Police Patil Shri Manohar Ambetkar. He stated that P.W.3 Jairam was also present alongwith Police Patil at that time.

8. P.W.5 Mahadu Ambetkar is a panch witness to the panchnama of the spot. In the cross-examination he stated that he signed the panchnama at the instance of the police without knowing the contents of the panchnama. P.W.6 Atmaram Patil is the Investigating Officer. In the examination-in-chief, he stated that

he had sent viscera to the chemical analyser to Mumbai under his forwarding letter. He stated that till his transfer i.e 02nd April, 1988 he did not receive the certificate from the chemical analyser.

9. The learned Advocate for the Appellant invited my attention to the evidence of the medical officer and submitted that the said evidence completely destroys the case of the prosecution. He submitted that according to the medical officer the brain injuries caused to the deceased must have been sustained within 24 hours as it had a frank blood. He submitted that neither the deceased nor P.W.3 lodged any complaint about the alleged incident of assault though even according to the version of P.W.3 he was aware of the assault on the very day. He submitted that there are improvements in evidence of P.W.3 and P.W.4. He stated that evidence of P.W.4 could not have been accepted as it is really doubtful whether he could have seen incident while sitting in the house of one Bapu Deshmukh. He invited my attention to the fact that admittedly, P.W. 4 did not disclose the said incident to any one till his statement was

recorded by the police two or three days after the death of the victim. He invited my attention to paragraph No.8 of the impugned Judgment in which reference is to the forensic report about the viscera which speaks of poison. He submitted that if the report of chemical analyser as regards chemical analysis of viscera is on record which shows that there was a poison in the viscera, the case of the prosecution will have to be completely disbelieved. He submitted that the offence was not at all established and the conviction is based on surmises. He also invited my attention to the fact that though a certificate issued by Dr. Modi is produced on record and though Dr. Modi was cited as a witness, the prosecution has failed to examine the said witness and therefore, adverse inference needs to be drawn.

10. The learned A.P.P pointed out that the deceased was called to the house of the Appellant. The Appellant entered the house of the deceased and thereafter the Appellant bolted the door from inside and the a witness heard hue and cry of the deceased. He submitted that if evidence of P.W.4 is read as a

whole, his version that he could see the incident of assault by the Appellant on the person of the deceased through a window in the house of the Appellant will have to be accepted. He stated that direct evidence of an eye-witness cannot be discarded on the basis of evidence of medical officer who performed post mortem as his evidence is in the nature of opinion. He submitted that examination of Dr. Modi was not at all relevant as the certificate issued by Dr. Modi shows that he had simply referred the deceased to another doctor. He submitted that evidence of P.W.3 and P.W.4 proves the prosecution case. He was unable to point out from the record the report of the chemical analyser as regards chemical analysis of the viscera.

11. I have considered the submissions made by the learned Advocates appearing for the parties. P.W.3 is the father of the deceased. According to his version on the very day on which the deceased was assaulted by the Appellant, the deceased had met him when he found that blood was oozing from his mouth. However, P.W.3 did not file any complaint. He filed F.I.R only after the death of his son. He admitted in the

cross-examination that one Shri Manohar is the Police Patil of the village and the Appellant-accused had applied for the appointment as Police Patil of the village. He admitted that younger sister of his wife alongwith others deal in manufacturing illicit liquor in the village. In the cross-examination he pleaded ignorance when a question was asked to him whether the Appellant-accused was a panch witness who accompanied the raiding party when the police raided the gang of his wife’s younger sister. He denied the suggestion that as the accused acted as a panch witness in police case against his wife’s sister, at the instance of the said Manohar he has falsely implicated the accused. He admitted that he did not disclose in the F.I.R that when deceased Babu came home, blood was oozing from his mouth. He also admitted that he did not state in the F.I.R that deceased Babu had informed him about beating with fists given by the accused in his house. He admitted in the cross-examination that deceased vomited blood just in front of the dispensary of Dr. Modi before he was examined by the said doctor. Thus, the fact that deceased was examined by Dr. Modi is an admitted fact. In fact, a note given by Dr. Modi on

22nd February, 1988 (Exhibit 10) has been admitted in evidence with the consent of the parties. The note is addressed to a surgeon in which it is recorded that Babu was unconscious since morning and he vomited blood. Dr. Modi was cited as a witness obviously because was even according to the version of P.W.3, the said Dr. Modi had examined the deceased prior to his death. However, Dr. Modi was not examined.

12. The P.W. 4 stated that the deceased was called by the Appellant-accused to his house. After deceased entered the house, the door was bolted from inside. In examination-in-chief P.W.4 has stated thus:

> "Accused called deceased Babu into his house. I advised Babu to go with the accused in his house and return after doing his work. Deceased Babu entered the house of the accused alongwith the accused. I was observing from the bore well. Accused closed his door. Accused started beating the deceased. Babu was making hue and cry

due to beating suffered at the hands of accused. The well stands about 50’ from the door of the accused. I went to the Padvi of adjoining house standing near the house of the accused. Padvi belonged to one old man Bapu. On his advise I sat on his Padvi. The window of the house of accused was towards the Padvi of house of Bapu. I peeped through the window and saw beating given by the accused with the fists to Babu. He was landing fist blows on the head, back, abdomen of Babu. I left Bapu’s house and moved towards temple".

In the cross-examination P.W.4 stated thus:

". It is true that I did not tell about hue raised by Babu when I was standing near the bore well pump. **I sat in the Padvi of Bapu (Babu) Deshmukh for about 5 minutes. Nothing is visible from the padvi of Bapu inside the house of accused.** After sitting for 5 minutes in the padvi of Bapu Deshmukh

I went to the temple and I was there for 10 minutes.

. **It is true that the window to the house of accused is provided with iron grill and wooden plank.** It is true that the house of accused has one Padvi. I cannot tell how many rooms in the house of the accused. **There is window to the southern wall to the house of accused. The window is about 4' high from the ground level. I was peeping through the window raising my heels.** I did not see anything person except accused and deceased in the house of accused when I peeped through the window. It is true that as per my police statement wife and daughter of the accused were present in the house of the accused when I was peeping through the window". (Emphasis supplied)

Thus, from what is stated by him in the examination-in-chief, he could see assault by the Appellant-accused when he was sitting in the padvi of

one Bapu Deshmukh through the window of the house of the Appellant. In paragraph No.2 in his cross-examination, he has categorically stated that nothing is visible from the padvi of Bapu inside the house of the accused. He categorically stated that after sitting for 5 minutes in the padvi of Bapu he went to the temple. In further cross-examination he stated that the window in the house of the Appellant is 4 feet high from the ground level and he was peeping through the window by raising his heels. In examination-in-chief he has not at all stated that he went close to the window and peeped through the window by raising his heels. In fact his case is that for 5 minutes he sat in the padvi of Bapu and from there he saw the incident in the house of the Appellant. The larned A.P.P relied upon a sketch at Exhibit 14 and submitted that there is a window in the house of the Appellant-accused just opposite the house of Bapu. Though location of the window is certainly shown in the map at Exhibit 14, one cannot jump to the conclusion that it was possible to see clearly from padvi in the house of Bapu as to what was happening inside the house of the Appellant-accused. In the

sketch, the location of the padvi is not specifcally shown. The said sketch does not disclose the height of the plinth of the house of Bapu. Only on the basis of the sketch it cannot be positively held that through window of the house of the accused it was possible to see what was happening in the house while sitting in the padvi of house of Bapu. P.W.4 tried to improve the case in the cross-examination by stating that he went near the window and by raising his heels he was peeping through the window. There is one more aspect of the matter. P.W.4 did not report the incident to anyone and he disclosed the same to the police two or three days after the death of Babu. Immediately after the incident he had met his employer. Thus, he kept quiet for a period of more than ten days. It is pertinent to note that he has stated that alongwith the police Shri Manohar who was the Police Patil met him and the Police Patil advised him to give statement to the police. P.W.3 in his cross-examination admitted that the accused had applied for appointment to the post of Police Patil. All these factors lead to the conclusion that the version of P.W.4 that he could see what was happening

in the house of the Appellant is doubtful. The P.W.4 is the only alleged eye-witness.

13. It will be necessary to refer to the post mortem notes. Against column No.17 following five injuries are recorded:

"1) Oblique laceration on left side of lower lip 1/2" X 1/4" X 1/4".

2) Abrasion on right anterior shoulder joint 1" X 1/2".

3) Irregular abrasion on right posterior shoulder joint 1 1/2" X 1/2".

4) Abrasion on right scapular region 1/2" X 1/2".

5) Abrasion on interscapular region 1/2" X 1/2".

Column No.18 records that there were no fracture or any other injuries discovered on external examination. It is stated that the injuries mentioned in column No.17 are antimortem injuries. Against item No.19 it is stated in the notes as under:

19. Head-		
(i) Injuries under the scalp, their nature.	NAD	
(ii)Skull:- Vault and base-descibe fractures, their sites, dimensions, directions etc.	No fracture	
(iii)Brain- The apperance of its coverings, size weight and general condition of the	1) Extra dural haemorrhage is bright red colour, effusion of bllod collects downwards into the base of the	

organ itself and any abnormality found in its examination to be carefully noted (Weight M.3 gram F.2.75 grams).	skull. 2) Subdural hameorrhage diffused over both cerebral hemispheres and gravitate to the base of the brain and posterior aspects of the cerebral hemisphere. 3) Small petectial haemorrhages are present in the brain.

The opinion as to cause of death reads thus:

> ". Probable cause of death is due to intracranial haemorrhage due to blunt trauma to head.
>
> . Final cause of death will be given after receiving the chemical analysis report".

14. As pointed out by the learned Advocate for the Appellant, in paragraph No.8 of the judgment there is a reference to the report of the forensic expert about the viscera which speaks about presence of poison. I have carefully perused the entire record of the Trial Court. I find that any such report is not at all on record. The Investigating Officer has deposed that till the date on which he was transferred from the post, he had not received the report from the chemical analyser. It is very difficult to explain as to how the learned Judge has referred to the said report. The learned A.P.P could not throw any light on this aspect. If the said observation is correct, it raises a serious doubt about verasity of the prosecution case. The Medical Officer (P.W.2) who performed post mortem has clearly stated that the extra-dural haemorrhage was of frank blood without clotting. In the cross-examination he categorically stated that age of the injuries described in column No.17 was within 48 hours and the said injuries were not as old as 7 to 8 days. He categorically stated that injuries described in column No.19 must have been sustained within 24 hours because there was a frank blood and

the said injuries were not possible 7 to 8 days prior to the post mortem. He candidly stated that he was unable to give opinion about final cause of death as report of viscera was not available. The post mortem was performed by him between 01.00 p.m and 3.30 p.m on 23rd February, 1988. According to the prosecution case Babu expired on 22nd February, 1988 and incident of assault is 7 to 8 days prior to 22nd Febraury, 1988. Thus, the opinion of the Medical Officer runs completely contrary to the prosecution case as regards assault by the Appellant-accused 7 or 8 days prior to the date of death. In a given case if oral evidence is cogent and reliable, inconsistent opinion given by the medical expert may not defeat the prosecution case. In the present case, as indicated earlier, the evidence of only eye-witness is of doubtful nature.

15. It will be necessary to refer to a decision of the Apex Court in the case of **Solanki Chimnabhai Ukabhai Vs. State of Gujarat [(1983) 2 Supreme Court Case Page 174)**. The Apex Court held that ordinarily, the value of medical evidence is only corroborative and it proves that injuries could have been caused in

the manner alleged and nothing more. The defence can make use of medical evidence to prove that injuries could not possibly have been caused in the manner alleged. The Apex Court held that unless, however, the medical evidence in its turn goes so far as it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by the eye-witnesses, the testimony of eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. In the present case, the credibility of the version of the only eye-witness is seriously affected by not only the opinion of the medical officer but by the other material on record. There is a serious doubt created as to whether P.W.4, the alleged eye-witness could have seen the incident of assault while he was sitting in a house in front of the house of the Appellant. The reasons for discrediting the version of the said eye-witness are already recorded in earlier part of this judgment. In this case final opinion as regards cause of death is not on record as the report of the Chemical Analyser as regards viscera does not form part of the evidence. There is a categorical opinion

of the medical officer that the injuries mentioned in the column No.19 could have been caused only within 48 hours before post mortem was done. He has categorically opined that it is not possible that all the external injuries also could have been caused 7 to 8 days prior to the date of post mortem.

16. There is one more vital aspect of the matter. Even according to P.W.3 and the document at Exhibit 10, it is apparent that before his death, Babu was examined by Dr. Modi. It appear from the record that witness summons was served to Dr. Modi. It is not clear from the record whether Dr. Modi was present on the returnable date of the summons. However, it is also clear that no further steps were taken by the prosecution to procure the presence of the said doctor. In my view, the examination of the said doctor was very relevant for the purposes of unfolding the prosecution case as he is the only medical practitioner who had allegedly examined the deceased before his death. The evidence of P.W.2 is based on his opinion formed during the course of post mortem. Dr. Modi could have given opinion based on physical

examination of the deceased. In the case of **Habeeb Mohammad Vs. State of Hyderabad (A.I.R 1954 Supreme Court Page 51)** the Apex Court held that it is a bounden duty of the prosecution to examine the material witness, particularly when no allegation has been made that, if produced, he would not speak the truth. The Apex Court held that not only does an adverse inference arise against the prosecution case for non-production of material witness but the circumstances of his being withheld from the court casts a serious reflection on the fairness of the trial. In the present case Dr. Modi was not an ordinary witness. As stated earlier, his evidence was very crucial in unfolding the prosecution case. Therefore, in my view, adverse inference will have to be drawn against prosecution for not examining the said doctor, especially in the light of the opinion expressed by the P.W.2 in his evidence.

17. The learned Trial Judge has not at all noticed serious infirmities in the version of P.W.4 Kisan. The learned Judge has not at all considered the answer given in the cross-examination by Kisan that nothing

was visible from the padvi of house of Bapu where he was sitting for a period of five minutes. The learned Judge was impressed by the fact that prosecution witnesses belong to nomadic community and that the members of the said community are accustomed to consumption of country liquor. As stated earlier the learned Judge has referred to forensic report on viscera which is not at all on record. The said report, going by the discussion made in the judgment, is completely against the prosecution. The learned Judge has brushed aside the silence of P.W.4 Kisan for more than 7 to 8 days by observing that such incidents are common in the community of Katkaris who are always the victims of the high handedness of the land owners in the remote places of Raigad district. In fact, the learned Judge has not at all considered answers given in the cross-examination by witness Kisan coupled with his failure to disclose the incident almost for a period of ten days and more. The opinion of P.W.2 can certainly be used to discredit the version of the eye-witness. One of the important aspects, namely, the failure of the prosecution to examine Dr.Modi who was the only medical practitioner who had examined the

deceased before the death has been completely ignored by the learned Judge which was very relevant in the light of the opinion expressed by the P.W.2. Even the P.W.No.3, the father of the deceased kept silence for a period of 7 to 8 days though he was allegedly made aware about the assault by the accused on the same day.

18. After considering the evidence, the learned Judge has held that the accused caused injury to the deceased by giving serious beating with fists on the person of the deceased. The charge was framed under section 302 of the Indian Penal Code. The learned Judge convicted the Appellant for the offence punishable under the second part of section 304 of the Indian Penal Code.

19. In my view, the prosecution has miserably failed to establish the guilt of the Appellant beyond reasonable doubt. Hence, the conviction and sentence of the Appellant deserves to be quashed and set aside.

20. Hence, I pass the following order:

(i) The impugned Judgment and Order is quashed and set aside and the Appellant is acquitted of the offence alleged against him.

(ii) If the Appellant has deposited the fine amount, the same may be refunded to him.

(iii) Bail bonds of the Appellant are cancelled.

JUDGE